United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL 74-1541 B

United States Court of Appeals P/S

FOR THE SECOND CIRCUIT

BREWER DRY DOCK COMPANY,

Plaintiff-Appellee,

against

SS MORMACLAKE, her engines, etc., and MOORE-McCORMACK LINES, INC.,

Defendants-Appellants.

BRIEF OF DEFENDANTS-APPELLANTS

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against

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Defendants-Appellants.

BRIEF OF DEFENDANTS-APPELLANTS

Preliminary Statement

This is an appeal from a decision of Robert L. Carter, United States District Judge for the Southern District of New York, who directed entry of judgment for plaintiff against defendant, SS MORMACLAKE, her engines etc., and Moore-McCormack Lines, Inc. in the sum of $52,308, together with interest from the date that suit was filed, January 7, 1970, for repairs to the MORMACLAKE effected by Brewer in April, 1969. Judge Carter's decision has not been reported.

Statement Of The Issues Presented For Review

1. Did the trial judge apply the governing legal standard to the facts?

(a) Did the trial judge err in imposing upon Moore-McCormack the burden of offering evidence that Brewer did its job in a careless, negligent or reckless manner?

(b) Did the trial judge err in deciding that Moore-McCormack assumed the risk of Brewer doing damage to the tailshaft liner of the MORMACLAKE when Moore-McCormack authorized that it be hand ground?

2. Did the trial court err in awarding Brewer that part of its repair bill which related to work on the tailshaft?

Statement of the Case

Brewer sued to recover the reasonable value of work, labor and services performed by employees of Brewer aboard the MORMACLAKE. Brewer alleged the reasonable value of its services to be $52,308. Moore-McCormack admitted that Brewer performed work aboard the MORMACLAKE, but Moore-McCormack denied that the reasonable value of its services was $52,308. Moore-McCormack interposed a counterclaim alleging that Brewer's workmanship was faulty and by reason of Brewer's failure to render workmanlike service Moore-McCormack was damaged in the amount of $70,235.63. The trial court awarded Brewer the full amount of its claim and denied Moore-McCormack recovery on its counterclaim.

Facts

Brewer Dry Dock Company is a New Jersey Corporation and the owner and operator of a shipyard located at Mariners Harbor, Staten Island, New York (3a). Moore-McCormack Lines, Incorporated is a Delaware Corporation having its principal place of business in the City of New York, State of New York and was and still is the owner of the SS MORMACLAKE (3a, 4a).

Moore-McCormack's Port Engineer John W. Ballouz telephoned Mr. Fleck of Brewer on the 15th or 16th of April and gave him a list of the items of work which were to be performed by Brewer. One of those items included pulling the tail shaft of the MORMACLAKE (23a). On April 21,

1969 the MORMACLAKE entered the shipyard of Brewer at Mariners Harbor for repairs (23a).

The tail shaft forms part of the vessel's propulsion system (46a). It is approximately 26′ in length and weighs 22½ tons (26a, 74a). The tail shaft itself is steel. It is fitted with a liner of bronze. The bronze liner is shrunk on to the steel tail shaft to form one piece (44a). A tail shaft liner serves to protect the steel from corrosion. The tail shaft within the bronze liner rides on a bearing where it penetrates the hull. A gland serves to keep out sea water. The gland is packed with flax (46-47a). The tail shaft is drawn every three years to see if it has any defects (24a).

When the tail shaft was drawn it was seen that the liner in the area of the packing was deeply grooved (24a). Ballouz told Fleck to remove the shaft from the ship and machine the bronze liner on a lathe to take out the grooves (25-26a). Fleck told Ballouz that Brewer's lathe was not big enough to do the job (26a). Fleck also told Ballouz that Brewer's crane did not have the capacity to lift the tailshaft (26a). Ballouz told Brewer to grind off the shoulder of the liner to permit the installation of oversized packing (27a, 32a). The shoulder is a high spot that protrudes beyond the packing (27a). The tailshaft liner was ground by hand by employees of Brewer (27a, 38a). The tailshaft liner of the MORMACLAKE had never been machined before Brewer did its work in April, 1969 (79a).

After the grinding was completed and before the tailshaft was put back in the vessel it was seen by John Fauske, Assistant Superintendent Engineer for Moore-McCormack Lines (86a). On inspection he felt that the liner looked eccentric (86a). A straight edge was used to determine this and the Moore-McCormack representative and Brewer representative concluded that the eccentricity was outside the area of the packing gland and, therefore, would not affect the efficient operation of the tailshaft (86a-87a).

When the MORMACLAKE was proceeding from Brewer to Bayonne, New Jersey, the ship's chief engineer, John E. Shanahan, observed excessive leakage through the stern packing gland (80a). The leakage was much worse than it was before Brewer worked on the liner (80a). There must be some leakage of salt water through the stern packing gland when a ship is underway because salt water is the only lubricant you have for your shaft as it passes through the stern tube (42a). The MORMACLAKE went to Davisville, Rhode Island after leaving Bayonne. The leakage through the stern gland on the vessel from Bayonne to Davisville was very bad (80a). Shanahan replaced a turn of packing in Davisville (Deft's. Ex. Z4, p. 19). The MORMACLAKE sailed from Rhode Island to Baltimore, Maryland. The leakage during the voyage was bad (81a). When the vessel arrived in Baltimore on May 3, 1969 Moore-McCormack engaged the General Ship Repair Corporation of that City to repack the stern gland (Deft's. Ex. Z4, p. 22).

The leakage from the stern gland on the voyage from Baltimore to the Panama Canal was about the same as it was after leaving the Brewer yard (81a). Just before the MORMACLAKE arrived at the Panama Canal the chief engineer noticed a sideway motion of the whole packing box (81-82a). After leaving the Panama Canal the flange started leaking at the after bulkhead (82a). In an effort to control the leaking the ship's engineers attempted to take up on the studs and in so doing sheared two studs (82a). The shearing of the two studs indicated to the chief engineer that the vessel was in trouble and after conferring with the chief engineer the captain diverted to California (82-83a).

The vessel diverted to California at 4:00 P.M. on May 13, 1969. It arrived in San Pedro on Saturday, May 17 and went directly to the drydock of the Bethlehem Steel Company. It entered the drydock at 1:28 P.M. on May 17. The drydock was dry at 5:25 P.M. (54a). On Sunday, May

18 the following persons were on board the MORMACLAKE to survey the shaft and stern gland:

Mr. J. Fauske, representing owners

Mr. V. Newman, representing Brewer Drydock Company

Mr. Cummings, representing Brewer Drydock Company

Mr. G. M. Dupee, representing Brewer Drydock Company

Mr. A. Kilpatrick, representing Lloyds Agency

Mr. Finley, representing Lloyds Agency

Mr. P. M. Davis, representing The American Bureau of Shipping

Mr. Thomas Goedewaagen, representing United States Salvage (46a)

Mr. Fauske and Mr. Goedewaagen testified at the trial. Brewer called none of the persons who represented it at the survey in California. After the tail shaft was drawn it was taken ashore and examined on a lathe. The tail shaft liner was found to have an eccentric surface in way of the packing gland (46-47a). Wear on a tail shaft caused by packing is concentric. The eccentricity noted in California was not due to normal wear and tear of packing (64a) but was caused by the use of a hand grinding tool which took off too much metal in an irregular manner around the circular shaped tail shaft liner (53a).

Because the tail shaft liner had been ground eccentrically the tail shaft was wobbly and the flax packing could not properly choke the shaft (47a). Since the packing could not properly be fitted to the tail shaft sea water would keep coming in the vessel (47a). The employees of Brewer who ground the tail shaft liner took off too much metal in an irregular manner and caused the liner to be put out of round (53a). When the tail shaft was taken to the

machine shop of the Bethlehem yard in California it was found that there was not enough metal left on the liner to grind a true surface (Transcript p. 147). Since there was not enough metal remaining on the liner to permit it to be machine ground and replaced in the ship it was necessary to take a machine cut on the wooden bearing in the stern tube and insert a replacement tail shaft (48a; Transcript pp. 147-148).

The proximate cause of the excessive leakage at the stern gland and the movement of the stuffing box of the MORMACLAKE requiring the diversion of the ship to California and the repairs effected at the Bethlehem Shipyard was the irregular ground surface on the tail shaft liner in way of the packing area (48a).

All of the work done by Brewer on the tail shaft, for which Brewer charged Moore-McCormack $9,067.00 (71a) had to be redone in the Bethlehem shipyard in California (48-52a; Deft's Ex. R & S).

Summary of Argument

The District Court erred in that it failed to apply the governing legal standard to the facts. It rejected the authorities which impose a warranty of workmanlike performance upon marine contractors, and it decided the action as if it were based on tort rather than contract.

POINT I

The District Court erred in imposing upon Moore-McCormack the burden of offering evidence that Brewer did its job in a careless, negligent or reckless manner.

A contract for making repairs upon a vessel is a maritime contract. *The Robert W. Parsons*, 191 U.S. 17 (1903), and is governed by maritime law. *Midwest Marine Inc.* v. *Stur-*

geon Bay Shipbuilding and D.D. Co., 247 F. Supp. 283 (E.D. Wisc. 1965).

As noted by this Court in *International Mercantile Marine S.S. Co.* v. *W. & A. Fletcher Co.*, 296 Fed. 855 (1924), cert. denied 264 U.S. 597, when a ship is delivered to a yard for repair, the contract is one of bailment and the shipyard undertakes to do the work with whatever degree of skill is adequate for due performance.

Moore-McCormack offered the only evidence with regard to the need to divert the MORMACLAKE to California. Moore-McCormack's surveyor Goedewaagen testified that the casualty was the direct result of an irregular ground surface on the tailshaft liner (48a). Too much metal was ground from the liner in an irregular manner (53a). After recognizing that hand grinding was a limited repair (62a), Goedewaagen described the grinder which was used for this type of work and the precautions which should be taken to avoid grinding too deeply (63a).

Moore-McCormack established to the satisfaction of the District Court that the shaft was eccentric when it was examined in California and the eccentricity was the result of the work done by Brewer's employees. The District Court's error stemmed from its determination that Moore-McCormack was required to offer evidence that Brewer did its job in a careless, negligent or reckless manner.

As written on page 858 of this Court's opinion in *International Mercantile Marine S.S. Co.* v. *W. & A. Fletcher Co., supra*:

> "Undoubtedly the general rule is that negligence is never presumed, and he that alleges it must prove the same; yet where one receives a chattel in certain condition, and redelivers it with marks of injury that only culpable negligence would probably cause, 'it is the bailee who should open his mouth and make explanation to relieve himself'; and certainly slight

> evidence under such circumstances will shift the burden of evidence. Schouler, Bailments, § 23, and cases cited."

Brewer offered no evidence with regard to the tools which it used to do the job, the qualifications and experience of the men assigned to the job, or what steps it took to avoid grinding the shaft out of round.

To paraphrase the language of this Court in *Pan-American Petroleum Transp. Co.* v. *Robins Dry Dock & R. Co.*, 281 Fed. 97, 109 (1922), cert. denied 259 U.S. 586:

The burden was on Moore-McCormack to prove the contract and that at the time Brewer delivered back the ship the shaft was not properly adjusted and in good working condition. This burden was sustained. The presumption then arose that Brewer had not performed its contract and was responsible for the condition in which the tailshaft then was. The burden then rested on Brewer to overcome this presumption, to establish by a preponderance of the evidence that it had fully performed its agreement and that the eccentricity of the tailshaft was not due to its workmen's lack of skill, or careless conduct of the work, while the ship was in Brewer's possession. This burden was not sustained by Brewer.

See also: *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U.S. at 110-111, 1941 AMC at 1702, 1703.

POINT II

The District Court erred in deciding that Moore-McCormack assumed the risk of damage to the tailshaft liner.

After recognizing that Brewer was required to perform its services on the tailshaft liner in a workmanlike manner and ordinarily would be required to indemnify Moore-McCormack for any foreseeable damage that resulted from

Brewer's breach of its warranty of workmanlike performance, the District Court excused Brewer from the consequences of grinding the tailshaft liner out of round because:

1. It is difficult to hand grind a tailshaft liner and keep its concentricity, and

2. Moore-McCormack's employees examined the tailshaft liner after the grinding was completed.

In the words of the District Court:

> "The decision to hand grind the shaft was made with knowledge that risks were being incurred. Brewer cannot be faulted that as a consequence those risks which defendant assumed became a reality."

No authority was offered by the District Court to support this determination.

The only testimony which might be interpreted as attributing a risk to hand grinding a tailshaft liner was given by Moore-McCormack's surveyor Thomas Goedewaagen.

In response to questions by the Court Mr. Goedewaagen testified as follows (62a-63a):

> "Q. In your opinion, can a tailshaft of the kind in question with a liner, can it be hand ground without some mark of the surface without leaving some eccentricity?
>
> Let me state it another way:
>
> Can a shaft of this kind be hand ground rather than machine ground?
>
> A. In my opinion no, your Honor. In my opinion I think hand grinding is a very limited repair. It can only do a little bit of it. You are asking for trouble if you go too far.
>
> Q. The second question I wanted to ask you is this: If the instruction was given to hand grind the shoulder of the liner sufficiently to allow oversized packing, in your judgment could that have been a cause of what

happened?

A. No, I don't believe so. If I understand your question correctly, if you gave an order to grind it.

Q. Hand grind the shoulder to permit oversized packing?

A. You would have to make sure that you grind it concentrically, that is, evenly all the way around and take a limited amount off."

The Court's second question appeared to indicate that it understood that Moore-McCormack requested Brewer to perform the limited repair of hand grinding the shoulder of the tailshaft liner to permit oversized packing, i.e. when Moore-McCormack discovered that Brewer did not have the equipment to machine the liner, Moore-McCormack told Brewer merely to hand grind the shoulder of the liner in order to permit the installation of oversized packing. The Court's opinion, however, shows that the Court did not understand this distinction and believed that Moore-McCormack asked Brewer to do the same job by hand that would have been done by machine, if Brewer had had a lathe of sufficient size and a crane to remove the tailshaft from the MORMACLAKE.

The District Court missed the basic points of the case:

1. Hand grinding the shoulder of the tailshaft liner sufficiently to allow oversized packing could not have been a cause of what happened (Goedewaagen 62a).

2. The proximate cause of the excessive leakage at the stern gland and the movement of the stuffing box requiring the diversion of the MORMACLAKE to California and the repairs effected at the Bethlehem Shipyard was the irregular ground surface of the tailshaft liner, not at its shoulder, but in the area of the packing (Goedewaagen 48a).

3. The man or men assigned by Brewer to grind the tailshaft went too far.

As set forth in 8 C.J.S. Bailments § 22, page 375:

> "In a bailment for alteration or repair of the thing bailed, the bailee impliedly agrees that the thing when so altered or repaired will be reasonably fit for, or capable of, the use intended, of which use the bailee shall know."

Brewer offered no evidence to the effect that it did not want to undertake to hand grind the shoulder of the liner or that it was unable to do the job. Nor did Brewer disclaim its warranty that the tailshaft would be reasonably fit for its intended use when the repairs were completed.

Two additional facts point up the District Court's error:

1. It was not necessary to have done any work at all on the tailshaft liner to pass the inspection of the United States Coast Guard and the American Bureau of Shipping. The tailshaft could have been reinserted in the ship without any work being done on the liner by Brewer, and the American Bureau of Shipping would have approved it (34a).

2. Prior to April, 1969 Moore-McCormack had hand ground a dozen tailshaft liners, and since 1969 an additional one or two liners had been hand ground (39a, 65a).

The District Court's determination that Moore-McCormack's inspection of the tailshaft liner after Brewer completed its work relieved Brewer of its warranty of workmanlike performance is in direct conflict with the Supreme Court's ruling in *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1955). Ryan had loaded Pan-Atlantic's ship with a mixed cargo, including rolls of pulp board, and unloaded it in Brooklyn. During the unloading a longshoreman employed by Ryan was injured by a roll of pulp board which had been insufficiently secured when it was stowed. The longshoreman sued Pan-Atlantic and obtained a judgment. It was held that the

shipowner was entitled to reimbursement from Ryan for the amount of the judgment paid by the shipowner. Ryan suggested that because the shipowner had an obligation to supervise the stowage and had a right to reject unsafe stowage of the cargo and did not do so, it should be barred from recovery from the stevedoring contractor of any damage caused by that contractor's uncorrected failure to stow the rolls in a reasonably safe manner. The Supreme Court wrote (350 U.S. 124, 134):

> ". . . Accepting the facts and obligations as above stated, the shipowner's present claim against the contractor should not thereby be defeated. Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman for proper stowage of the cargo, it is clear that, as between themselves, the contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense. Respondent's failure to discover and correct petitioner's own breach of contract cannot here excuse that breach."

The Supreme Court in *Ryan* noted in footnote 3 that the contractor received a contractual quid pro quo from the shipowner for assuming responsibility for the proper performance of the shipowner's stevedoring requirements (350 U.S. 129) and compared the contractor's warranty of workmanlike service to a manufacturer's warranty of the soundness of its manufactured product stating that the shipowner's action was not changed from one for a breach of contract to one for a tort simply because recovery turned upon the standard of the performance of the contractor's service (350 U.S. 133, 134). At pages 129 and 134 the Supreme Court cited *Bethlehem Shipbuilding Corp.* v. *Joseph Gutradt Co.*, 10 F.2d 769, as one of its authorities.

In *Bethlehem Shipbuilding Corp.* v. *Joseph Gutradt Co.*, 10 F.2d 769 (9 Cir. 1926), the shipowner impleaded Bethle-

hem Shipbuilding Corp. in an action which was brought against the shipowner by Gutradt for damage to cargo. The shipowner claimed that the cause of the damage to the cargo was the Bethlehem Corporation's breach of a contract to repair its vessel, the ECUADOR.

The shipowner had contracted with Bethlehem to repair the ECUADOR and among other matters to overhaul all clapper valves on ship's sides, renewing all missing or broken pins and clapper valves. A clapper valve is a non-return valve in the hold, and it has the function of letting the drain water out of the vessel and not allowing sea water to come in. After Bethlehem completed its repairs the ship was redelivered to the shipowner and Gutradt's cargo was loaded. Shortly thereafter one of the stevedores noticed that a clapper valve was uncovered. The stevedore reported the matter, and upon examination the chief engineer discovered that the cover was not in place, but was lying with the bolts on a cargo batten. The chief engineer bolted it back in its place. At that time the after part of the 'tween decks of that hold was loaded up to the deck and out in the wings. The engineer crawled over the cargo to see if other valves were intact or not, but he found them covered with cargo. He then went into other holds, where he found all valves, not covered, in sound condition. When the ECUADOR was at sea soundings showed water in the No. 2 hold. The ship put in at Wilmington, California where, after discharging cargo, it was found that the water entered through a clapper valve. Cargo was awarded a recovery against the shipowner and the Court then considered the shipowner's right to reimbursement from Bethlehem.

It was not contested by Bethlehem that ordinarily the shipowner was under no duty to Bethlehem to inspect the valves after redelivery of the ship. Bethlehem argued, however, that since one valve was found to be defective that the steamship company had sufficient knowledge to

put it on notice that water might enter through another defective valve. The Court reasoned that if there was no duty to Bethlehem by the shipowner to inspect, there was no principle upon which the shipowner could be held liable for not having inspected all the clapper valves. The Court rejected Bethlehem's contention that because it had failed to fix the one valve that was found uncovered, there arose an obligation on the part of the shipowner to assume that there were other defective valves. It was further stated by the Court of Appeals that the officers of the ship were not bound to anticipate the breach of the contract by Bethlehem and were not guilty of negligence in their conduct in failing to prevent the damage.

See also: *Hill* v. *George Engine Company,* 190 F.Supp. 417, 420 (D.C.E.D.La. 1961).

POINT III

The Trial Court erred in awarding Brewer that part of its repair bill which related to work on the tailshaft.

Moore-McCormack does not appeal from the part of the District Court's decision which upheld Brewer's claim that the reasonable value of its services was $52,307.00, except for $9,067.00 which was charged for work on the tailshaft. All of the work on the tailshaft for which Brewer charged $9,067.00 was required to be redone at the Bethlehem Shipyard in California. As argued above, the work on the tailshaft was not performed in a workmanlike manner and Brewer should not be paid for it.

CONCLUSION

The judgment should be reversed, with costs, and the cause remanded, with directions to assess Moore-McCormack's damages and to reduce Brewer's charges by $9,067, the amount which it claimed for work on the tailshaft.

Respectfully submitted,

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Services of three (3) copies of
the within Brief is
hereby admitted this 21 day
of June, 1974

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(56265)